

CIV/APN/243/90

IN THE HIGH COURT OF LESOTHO

In the Application of:

WILLIAM JAMES LEMENA Applicant

and

REGISTRAR OF THE HIGH COURT 1st Respondent
ATTORNEY-GENERAL 2nd Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 9th day of August, 1995.

The applicant herein seeks an order, against the Respondents, framed in the following terms:

- "1. Dispensing with the period of service of this application on the grounds of its urgency,
- 2. That a Rule Nisi be issued calling upon the Respondents to show cause (if any) on a date to be determined by this Honourable Court why the following order should not be made absolute:
 - (a) the 1st Respondent should not be restrained and interdicted from interfering with the applicant's duties by distributing the court processes to the applicant's assistants;
 - (b) the applicant should not be allowed, in the mean time, to

proceed with his duties of uplifting the court processes from the above Honourable Court's Registry and distributes the same at his own discretion to his assistants.

(c) the 1st Respondent should not be ordered to pay the costs of this application.

3. That prayer 2(a) and (b) should operate with an immediate effect as an interim order;

4. Granting such further and/or alternative relief as the above Honourable Court may deem fit."

The application was granted only in terms of prayer 2 i.e. not prayers 1 and 3 of the notice of motion. The return day was fixed as the 15th October, 1990. The Respondents intimated intention to oppose confirmation of the rule. Affidavits were duly filed by the parties.

It is worth mentioning that after several extensions of the return day, the matter was finally placed before my brother Lehohla, J. for hearing when the applicant filed a notice of motion in which he moved the court that the judge should recuse himself. The notice of motion was not opposed and Lehohla, J. accordingly recused himself. The matter was finally placed before me for hearing.

It may likewise be mentioned, at this juncture, that in their answering affidavits, the Respondents

intimated intention to raise, at the hearing of this matter, certain points, in limine. That was, however, not pursued at the commencement of the hearing of this case and I need not deal with it now.

In as far as it is relevant, it is common cause, from affidavits, that on 2nd October, 1986, the Chief Magistrate appointed, purportedly in terms of the provisions of section 12 of the Subordinate Courts Proclamation 58 of 1938, the applicant as messenger of the Maseru Magistrate Court subject to certain conditions. The appointment was, on 12th November, 1986, approved by the Registrar of the High Court who, on the same day, also appointed the applicant as deputy sheriff, of the High Court. The applicant's conditions of appointment as messenger of the Maseru Magistrate Court were to apply, mutatis mutandis, to his appointment as deputy sheriff of the High Court. The conditions were as follow:

" Mr. William James Lemena is hereby appointed in terms of sec. 12 of the Subordinate Courts Proclamation 58/1938 as Messenger of the Court for Maseru district.

His appointment is for five (5) years subject to the following conditions:-

1. That the security of M2,000 (two thousand Maluti) lodged with the Standard Bank be not uplifted by him for this period.

- 2. The remuneration attached to the post is as set out in Table B of the second annexure to the Subordinate Court Rules, to the said Proclamation.
- 3. That he faithfully and efficiently execute his duties as prescribed by the Subordinate Court Rules.
- 4. That he employs sufficient assistants and allocates and supervises their work to ensure efficient service and/or execution of processes of court. Such assistants shall be persons of integrity and shall be subject to the approval of the chief magistrate but shall otherwise remain under firm control and supervision of the said Mr. Lemena who shall always remain vested with the power to suspend or dismiss the said assistance (sic).
- 5. That the contract will take effect from 1st November, 1986.

(Signed) A.N. Matete 2/10/86
Chief Magistrate

Approved by:

Signed) N. Lethunva 12.11.86
Registrar of the High
Court

William James Lemena

is hereby appointed as deputy sheriff of the High Court and Court of Appeal.

The conditions of appointment set out above shall, mutatis mutandis, apply to Mr. Lemena in respect of the execution of his duties as deputy sheriff of the High Court and of the Court of Appeal.

(Signed) N. Lethunva 12.11.86
Registrar of the High Court."

The applicant employed, pursuant to his purported appointment as messenger of the Maseru magistrate court and deputy sheriff of the High Court, five (5) persons as "Assistant Court Messengers", whatever that means, directly responsible to him, in the service of court processes issued out of the Maseru magistrate court, the High Court and the Court of Appeal. He had since been the sole person responsible for allocating to the "assistant court messengers" court processes for service.

However, at a meeting held on the High Court premises, on 31st August, 1990, the Registrar of the High Court (one Miss Ramahloli) told the applicant and his "assistant Court Messengers" that she had decided to take the responsibility of allocating High Court processes to them from then onwards. Despite the applicant's objection to the move, the Registrar of the High Court did herself carry out the duty of allocating the court processes to him and his "assistant court messengers".

On 5th September, 1990 the applicant caused a letter (annexure WJL3) to be addressed to the Registrar of the High Court. It was copied to the Chief Magistrate, the Secretary of the Law Society and the Senior Clerk of Court. In that letter, the applicant informed the Registrar of the High Court

that the decision she had taken at the meeting of 31st August, 1990 was unjust and should not, therefore, be implemented. There was no response from the office of the Registrar of the High Court. Consequently, the applicant approached his attorney of record who, on 14th September, 1990, addressed a letter to the Registrar of the High Court. The letter reads, in part:

"re: Complaint by Mr. W.J. Lemena:

We refer to the abovementioned matter and we wish to inform you that we are herein acting on behalf of Mr. Lemena, the deputy sheriff of the High Court as well as the Messenger of Court for the Magistrate Court.

Our instructions are to inform you that the office of the Registrar has taken upon itself to seize from Mr. Lemana powers vested in him in terms of his letter of appointment dated the 1st November, 1986.

In terms of the said letter, Mr. Lemena is the sole appointed deputy sheriff as well as the messenger of court and his powers are to employ his deputies who are directly responsible to him and to allocate to them and to supervise their work to ensure efficient service.

We confirm that by taking these powers from Mr. Lemena is a direct contravention of the provisions of his letter of appointment.

You are further advised that Mr. Lemena as the only appointed deputy sheriff and the messenger of court has furnished a security to the High Court in terms of the rules that his security covers his assistant, they cannot serve any processes which are not issued by Mr. Lemena to them.

Our instructions are, therefore, to inform you that you should immediately desist from distributing processes to Mr. Lemena's assistants if you continue to do so

we will be obliged to apply to the High Court for an interdict.

Yours faithfully,

Sgd N. Mphalane
N. Mphalane & Co."

There was no reply, from the office of the Registrar, to the above cited letter. In the contention of the applicant, the action of the Registrar was an interference with the rights conferred upon him, in terms of his (applicant's) letter of appointment. She should, therefore, be interdicted as a matter of urgency. Hence the institution of the present proceedings for an order as aforesaid.

On behalf of the Respondents, Gugu Sello and Baholo Lesenyeho, the Acting Deputy Registrar and the Assistant Registrar of the High Court, respectively, deposed to answering affidavits in which they denied that the applicant was appointed the sole deputy sheriff. They averred that it had come to the notice of the office of the 1st Respondent that the applicant was, inter alia, causing serious delays and discrimination in the service of court processes. As proof thereof, they attached letters of complaints from the offices of attorneys Du Preez, Liebetrau & Co and Harley, Morris & Co.

Due to his failure to perform faithfully, diligently and efficiently the duties he had been appointed for, the office of the 1st Respondent decided, therefore, to curtail the applicant's duty to uplift the High Court processes for service. The deponents denied the applicant's contention that the decision of the 1st Respondent was an interference with any rights of the applicant and that she should, therefore, be interdicted.

The deponents do not, in their answering affidavits, seem to dispute that the applicant was, on 12th November, 1986, appointed the messenger of the Maseru Magistrate Court. What they dispute is the applicant's appointment as the sole deputy sheriff of the High Court and the Court of Appeal.

It may, however, be noted that the appointment of the applicant as messenger of the Maseru Magistrate Court, was purportedly made in terms of the provisions of S. 12 of the now repealed Subordinate Courts Proclamation 58 of 1938 which was the applicable law at the time. The section read:

"12. The written return of a messenger or any person authorised to perform any of the functions of the court shall be prima facie evidence of the matter therein stated".

It will be readily seen that the above quoted section 12 of the Subordinate Court Proclamation 58 of 1938 dealt with the effect of messenger's return of service and had nothing to do with the appointment of messengers of court. Section 10 of the Subordinate Courts Proclamation 58 of 1938 (as amended) was the relevant section for the appointment of messengers of court. The section read:

"10. A magistrate may, subject to the approval of the Registrar of the High Court, appoint messengers and deputy messengers of the court, subject to such conditions as to remuneration and tenure of office as the Registrar of the High Court may determine."

The appointment of the applicant, as messenger of court, in terms of the provisions of section 12 of the Subordinate Courts Proclamation, supra, was a nullity and of no legal force or effect, for the simple reason that the section did not empower the chief magistrate to appoint him (applicant) as such. That being so, the applicant cannot, in my opinion, be heard to say he was lawfully appointed messenger of the Maseru Magistrate Court.

It is common cause that pursuant to clause 4 of his conditions of employment, as embodied in his purported letter of appointment, the applicant engaged, as "assistant court messengers", certain

people viz. Masienyane, Matete, Kepanyane, Kotele, Ngosa, Peleha and Malefane. It is to be noted, however, that the above cited section 10 of the Subordinate Courts Proclamation 58 of 1938, which was the law applicable at the time, made no provision for the appointment of "assistant court messengers" or deputy messengers by the applicant who was admittedly not a magistrate. What the law provided was the appointment (with the approval of the Registrar of the High Court) of messengers and deputy messengers of the court by a magistrate. The engagement, by the applicant, of the five (5) people as "assistant court messengers", was, therefore, in conflict with the provisions of the relevant law, namely section 10 of the Subordinate Courts Proclamation 58 of 1938. It could not, for that reason, be valid.

Although, in their answering affidavits, the deputy Registrar and the assistant Registrar of the High Court denied that he was appointed the deputy sheriff of the High Court and the Court of Appeal, proper reading of his letter of appointment leaves no doubt, in my mind, that, on 12th November, 1986, the applicant was so appointed by the Registrar of the High Court. The salient question that arises for the determination of the court is, however, whether or not the Registrar of the High Court was empowered to

appoint, as she did, the applicant as the deputy sheriff.

It is significant to note, in this regard, that rule 2 of the Rules of the High Court of Basutoland, prescribed by the High Commissioner's Notice 8 of 1941 provided, in part:

"2."sheriff" shall mean the Registrar of the High Court, and shall be deemed to include such Deputy Sheriff or Deputy Sheriffs as he may from time to time appoint."

The Registrar, as the sheriff of the High Court, was, therefore, empowered, in terms of the provisions of the above cited rule, to appoint Deputy Sheriffs. The Rules of the High Court of Basutoland prescribed by the High Commissioner's Notice 8 of 1941 were, however, repealed and replaced by the High Court Rules, 1980 of which rule 1(1) provided, in part:

"1(1)"registrar" shall mean the Registrar appointed in terms of the High Court Act of 1978 and shall include any assistant registrar duly appointed as such.

"sheriff" shall mean the person duly appointed as such and shall include any deputy sheriff duly appointed and assistants to the

sheriff or deputy
sheriffs."

It is to be noted that although they provided how the Registrar and the Assistant Registrar of the High Court were appointed, the High Court Rules, 1980 made no provision as to how or by whom the Deputy Sheriffs were to be appointed. The rules merely defined the term "sheriff". They did not empower him to appoint his deputies and/or assistants. Consequently, the High Court Rules, 1980 were amended, in terms of the provisions of section 2 of the Legal Notice Number 32 of 1982, by deleting, in rule 1(1) thereof, the definition of the term "sheriff" and substituting the following:

"sheriff" means the Registrar of the High Court, Deputy Sheriff(s) and assistant Deputy sheriff(s)."

The above cited rule 1(1) of the High Court Rules, 1980 (as amended) again merely defines the term "sheriff" as meaning the Registrar of the High Court, Deputy Sheriff(s) and Assistant Deputy Sheriff(s). Unlike rule 2 of the now repealed Rules of the High Court of Basutoland prescribed by the High Commissioner's Notice 8 of 1941 it does not empower the Registrar, or the Sheriff of the High Court, to appoint Deputy Sheriff(s). I am not aware of any other law that empowers the Registrar, or the sheriff

of the High Court, to appoint another person as deputy sheriff. Nor have I been referred to any such law.

In the circumstances, it can only be assumed that when, on 12th November, 1986, she appointed the applicant as Deputy Sheriff, the Registrar of the High Court was relying on the provisions of rule 2 of the Rules of the High Court of Basutoland prescribed by the High Commissioner's Notice 8 of 1941. That law had, however, been repealed in 1980 and was, therefore, no longer applicable in 1986. The Registrar of the High Court could not, in my view, properly rely on a non-existent law for the appointment of the applicant as deputy sheriff. The question I have earlier posed viz. whether or not the Registrar of the High Court was empowered to appoint, as she did, the applicant as Deputy Sheriff must, therefore, be answered in the negative.

In the premises, I come to the conclusion that this application ought not to succeed. It is dismissed and the rule accordingly discharged. In the discretion of the court, the parties will bear their own costs.

The Registrar of the High Court is to bring this judgment to the attention of the Hon. the Chief Justice as a matter of urgency.

B. K. MOLAI

JUDGE.

Grt August, 1995.

For Applicant: Mr. Matooane

For Respondent: Mr. Mohapi.